



No. 251.

DEC  
JAMES H.

Brief of Blount for F.

Filed Dec. 11, 1897.

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In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

No. 251.

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WILLIAM RICHARDSON, TRUSTEE, }  
PLAINTIFF IN ERROR, }

vs.

LOUISVILLE & NASHVILLE R. R. }  
CO., ET AL., DEFENDANTS IN ERROR. }

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*On motion to dismiss the writ of error for want of jurisdiction.*

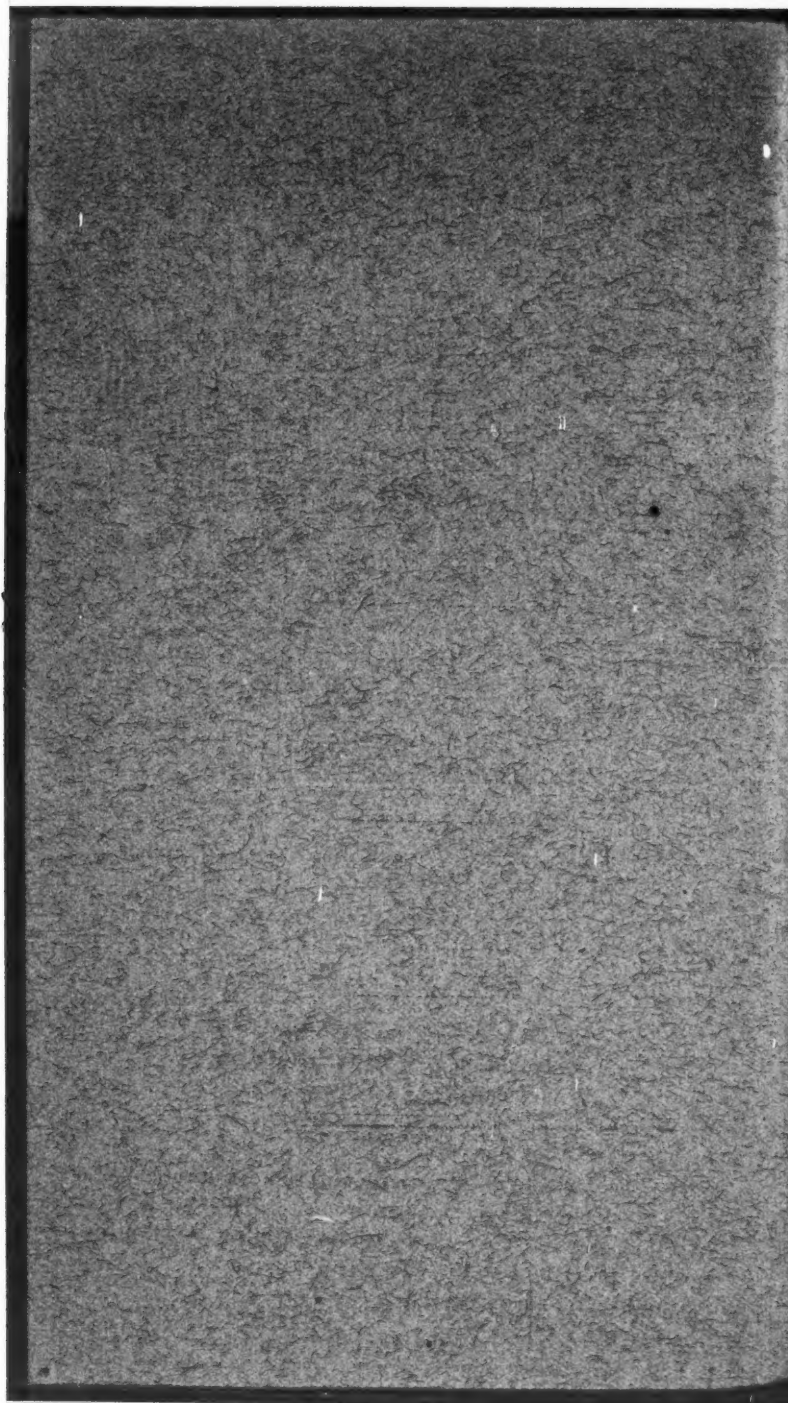
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Brief for Plaintiff in Error.

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W. A. BLOUNT, Attorney for Plaintiff in Error.

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Brief for Plaintiff in Error.

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We answer the contention of the defendants in error in the order in which their counsel discusses them:

I.

THAT THE FEDERAL QUESTION IS NOT SHOWN TO HAVE BEEN PROPERLY PRESENTED, IF AT ALL, TO THE STATE COURT.

The presentation sufficiently appears if by necessary intendment it is shown that the State court decided the question: Sayward vs Denny, 158 U. S., 180.

Or if the necessary effect of the decision was to determine adversely to the plaintiff in error the federal question, even though it does not appear that the State *nisi prius* or Supreme Courts formally passed on the question:

Roby vs. Coleheur, 146 U. S., 153.

And the certificate of the State Supreme Court that the question was presented and passed upon is sufficient in connection with the fact that the decision of such a question was necessarily precedent to the determination of the questions appearing to have been formally decided.

The decision of the State Supreme Court in the instant case makes the former decision in the same case (33 Fla., 1-162) a part of itself by reference, and both must be referred to to determine what was decided by the court.

In that case an objection to the grant to V. S. Pintado: "7th. That it was not one which was validated or recognized by the treaty between the United States and Spain," was made before the lower court (33 Fla. p. 19). The court overruled the objection.

The Supreme Court of Florida (33 Fla., p. 94) mentions the objection, but postpones consideration of it. It discusses the construction of the grant as to the character of the property conveyed, and then its validity, as depending upon the power of Ramirez, the intendant, to make it. It touches upon the treaty historically (p. 119), and finally announces (p. 161) that "it is unnecessary to review specially the rulings of the Circuit Judge as to the effect or validity of this grant, or to pass upon any question not already disposed of. These rulings are irreconcilable to the conclusions we have reached, and the judgment must be reversed," etc.

The Circuit Judge having held that the treaty validated and recognized the grant, the Supreme Court, having in mind this ruling, declared it irreconcilable with its own rulings and reversed the case.

It follows necessarily that the Court passed against the claim founded upon the treaty. If in this state of the record there be any doubt, the certificate of the State Court dispenses it.

## II.

THAT THE DECISION WAS BASED UPON TWO GROUNDS, ONE OF WHICH DID NOT INVOLVE A FEDERAL QUESTION.

To prevent the acquisition of jurisdiction by this Court, the non-federal question must have been so decided as to suffice by itself to sustain the decision :

Dibble vs. Billingham, etc., 163 U. S., 63.

It is not sufficient that an opinion shall have been given upon a question not federal, but the decision must rest upon that as an independent ground:

Cal. Powder Co. vs. Davis, 151 U. S., 393.

Here, while the State Supreme Court decided that the grant did not convey a fee simple title, yet it did not rest its reversal of the cause upon that ground. Upon the contrary, this decision was but one step in its arriving at the authority of the intendant to make the grant.

It did not decide that if the intendant had had authority to make the grant, the plaintiff could not have recovered in ejectment. Such decision would have been *obiter dictum*, because, since the intendant was held not to have had power, it would have been idle to discuss what the plaintiff could have done if the decision upon that question had been otherwise.

Nor did the State Supreme Court decide, either, that it was only a franchise. Indeed, it said that the grantee had "a property in the described land and water to the extent necessary to the full exercise of the stated rights," \* \* \* that is, of erecting wharves and bath houses.

It cannot be affirmed that the necessary effect of this holding is to prevent a recovery in ejectment, for one who has a property in land for the purpose of occupying it to the exclusion of all others may surely maintain an ejectment against another ousting him from such occupation.

### III.

THAT THE QUESTION PRESENTED BY THE RECORD AND CLAIMED TO BE A FEDERAL QUESTION IS NOT A FEDERAL QUESTION.

The authorities cited by the defendants in error upon this ground of the motion to dismiss are authoritative, and, if applicable, determine the question. The plaintiff in error, however, insists that they are not applicable, because the treaties under which they were decided were not like in terms to that which is here involved, and because the question here raised was not presented in them.

The eighth article of the treaty between the United States and Spain, dated February 22nd, 1819, the protection of which is invoked by the plaintiff in error, reads as follows:

"All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in said territories ceded by his Majesty to the United States, shall remain ratified and confirmed to the persons in possession of the grants to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty."

This not only protects all the grants of land made by the king, but those made by his lawful authorities, and provides that they all be protected to the "same extent as if the territories had remained under the dominion of his Catholic Majesty."

If the State Court has declared the grant invalid upon a ground which could not or would not have prevailed if the lands had remained subject to the dominion of Spain, then that court has violated the treaty, because it has not permitted it to afford the protection contemplated by it.

If the Spanish rule had remained, no inquiry would have been permitted into the authority of Ramirez to make the grant, or if permitted, could have been made only by the king. It is this exemption from inquiry which the treaty protected, and it was this right which was claimed in the court below, and of which the plaintiff in error was deprived by its decision.

Ramirez had authority to make grants:

U. S. vs. Arredondo, 6 Pet., 691-734 and 746.

U. S. vs. Clarke, 8 Pet., 451.

2 Cal. L. L., 185, 186-245-478.

White's Spanish Law, 157.

And being so authorized, his authority to make a particular grant cannot be questioned:

U. S. vs. Arredondo, 6 Pet., 723.

U. S. vs. Clarke, 8 Pet., 451.

U. S. vs. Percheman, 7 Pet., 95.

Strother vs. Lucas, 12 Pet., 409.

Or, if it can be questioned, the want of power must be clearly shown in that particular instance:

*Mobile vs. Eslava*, 9 Porter, 577, and authorities just cited.

Not by showing a general lack of power in the particular class of cases, for if inconsistent with his general powers, it will be presumed to be in accord with specific instructions from the king which are unknown to us:

*U. S. vs. Clarke*, 8 Pet., 447, 451, 454.

*U. S. vs. Percheman*, 7 Pet., 95.

But by proof that the king not only had the power to disavow, but actually disavowed the grant:

*U. S. vs. Clarke*, 8 Pet., 451.

*U. S. vs. Arredondo*, 6 Pet., 728.

and this presumption will be made and this proof required, even though the grant purport to be made under a power which did not authorize it:

*U. S. vs. Percheman*, 7 Pet., 95.

for no instance has ever been found in which the king repudiated grants made by his governors or intendants:

*U. S. vs. Sibbald*, 10 Pet., 322.

*U. S. vs. Clarke*, 8 Pet., 458.

The treaties involved in the decisions in the cases cited by the defendants in error contained no such protecting provisions as contained in the treaty under consideration, and do not rule this.

W. A. BLOUNT,

Attorney for Plaintiff in Error.